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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 16, 1999

EX PARTE PRESENTATION

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In re Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments (FCC File No. 97-31) and In re Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling on Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts From Awarding Monetary Damages Against Commercial Mobile Radio Service Providers for Violation of Consumer Protection or Other State Laws (WT Dkt. No. 99-263)

Dear Ms. Salas:

Please be advised that today, Bruce Beard of Southwestern Bell Mobile Systems, Inc. ("SBMS") and Patrick J. Grant, counsel for SBMS, met with Rose Crellin, David Furth, Roderick Mette and Mary Woytek of the Federal Communications Commission ("Commission") staff. The purpose of the meeting was to discuss pending lawsuits against wireless affiliates of SBC Communications Inc. challenging charges for CMRS services and to discuss issues raised in the above-referenced proceedings. The attachment to this letter was provided to the Commission staff to provide information on two specific court actions against SBC wireless subsidiaries (*Smilow v. SBMS* and *Joiner v. Ameritech*). In addition, during the meeting the Commission staff requested that SBC provide the staff with copies of court orders from those two actions. Copies of those four (4) orders are attached hereto.

In accordance with the Commission's rules governing *ex parte* presentations, two copies of this letter and the attachments are being provided for filing in each of the dockets referenced above.

No. of Copies rec'd 2
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Please do not hesitate to contact me at your convenience if you have any questions regarding the foregoing.

Sincerely,

Patrick J. Grant
Counsel for SBMS

cc: Rose Crellin, Federal Communications Commission
David Furth, Federal Communications Commission
Roderick Mette, Federal Communications Commission
Mary Woytek, Federal Communications Commission

Status of *Smilow v. Southwestern Bell Mobile Systems, Inc.*
No. 97-10307-REK (D. Mass.)

As stated in the September 25, 1998, *ex parte* presentation in this proceeding, since SBMS had filed its Petition before the Commission, the *Smilow* court had denied SBMS's motions to stay the proceeding on jurisdictional and abstention grounds. In addition, the *Smilow* court denied the plaintiff's motion for summary judgment on the merits, but conditionally allowed the plaintiff's motion for class certification.

Since that *ex parte* presentation was filed, on June 10, 1999, the court granted SBMS's motion for summary judgment regarding the plaintiff's state law rounding-up breach of contract claim, ruling that "rounding calls up to the nearest minute [ ] is the result the parties would have reached had they addressed this issue in entering their Contract." In addition, the court ruled that neither party was entitled to summary judgment on the incoming calls claim. The court did not rule on the plaintiff's Section 201(b) claim. Thereafter, the court, on September 30, 1999, denied both parties' motions for reconsideration of the court's earlier ruling regarding the plaintiff's incoming call claim. The next status conference in this action was set for November 15, 1999, but was then postponed until the end of November.

Status of *Joiner v. Ameritech Mobile*
(Ill., Madison County)

In this lawsuit, the trial judge ruled in favor of class certification and granted the plaintiffs' motion for summary judgment on liability finding that the company breached all customer contracts which (1) lacked a disclosure about rounding or (2) contained a disclosure about rounding but also contained language stating that that charges would be based on "actual usage." (Determining the size of the two classes requires the review of individual customer contracts.) The court has deferred a ruling on plaintiffs' motion for a third class which includes customers who have the rounding disclosure and do not have the "accrual usage" language.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, on her behalf and on behalf of all others similarly situated, Plaintiff v. SOUTHWESTERN BELL MOBILE SYSTEMS, INC. d/b/a CELLULAR ONE, Defendant	CIVIL ACTION NO. 97-10307-REK

Memorandum and Order
June 10, 1999

I.

Pending before this court are the following motions:

(1) Plaintiff's Motion for Partial Summary Judgment as to Liability on Breach of Contract Claim (Docket No. 63, filed December 9, 1998).

(2) Defendant's Cross Motion for Partial Summary Judgment (Docket No. 70, filed March 1, 1999).

(3) Plaintiff's Motion to Strike Affidavit of John Brunelle and for Sanctions Against Defendant Southwestern Bell Pursuant to Rule 56(g) of the Federal Rules of Civil Procedure (Docket No. 81, filed May 28, 1999).

(4) Defendant's Motion for a Protective Order to Prevent the Deposition of John Brunelle (Docket No. 84, filed June 8, 1999).

II. Background

This class action complaint was filed against defendant, Southwestern Bell Mobile Systems, Inc. ("Cellular One"), to recover damages under 47 U.S.C. §§ 201, 206, and 207, Massachusetts General Laws, Chapter 93A, §2(a), and the common law of contracts.

Cellular One is in the business of selling cellular services. The named plaintiff ("Smilow") entered into a contract (the "Contract") for cellular telephone services with the defendant on December 31, 1995. Paragraph 13 of the Terms and Conditions of the Contract states:

> Chargeable time for calls originated by a Mobile Subscriber Unit signals call initiation to CI's [Cellular One's] facilities and ends when the Mobile Subscriber Unit signals call disconnect to CI's facilities and the call disconnect signal has been confirmed. Chargeable time may include time for the cellular system to recognize that only one party has disconnected from the call, and may also include time to clear the channels in use.

Docket No. 65, Ex. 1, p. 2.

In the Contract, plaintiff chose a "rate plan." Docket No. 65, Ex. 1, p. 1. She chose the "ATGIF" rate plan, which specified a certain cost per minute, depending upon the time of day of the call (Docket No. 76, Ex. A, p. 79), and included 20 "free" minutes (Docket No. 75, p. 2).

Plaintiff alleges that defendant overcharges for its cellular phone service in two ways. First, she asserts that defendant, in violation of the contract between the parties,

charges for incoming as well as outgoing calls to plaintiff's cellular phone. Second, she alleges that defendant, in violation of the contract between the parties, rounds up the Chargeable Time to the next whole minute.

Both parties request that summary judgment be granted on both of these contentions.

III. Plaintiff's Motion to Exclude the Brunelle Affidavit

The substance of Brunelle's Affidavit is the following averment:

> In the context of cellular technology, the terms "call initiation," and "originated" both refer to incoming and outgoing cellular telephone calls. Only the mobile telephone, by means of the "send" key, can "signal call initiation" to the cellular tower thus "originating" a cellular telephone call. In this manner, both incoming and outgoing calls are "originated" by the mobile telephone.

Docket No. 74, p. 2.

Plaintiff requests that this court exclude Brunelle's Affidavit and that the court sanction defendant for having filed it on two grounds. Docket No. 81.

The first basis for the Motion is that Cellular One filed a rate tariff with the Massachusetts Department of Public Utilities on December 29, 1993 (canceled on August 10, 1994). See Docket No. 82, Ex. 2. In this document, Cellular One detailed its billing procedures, distinguishing in a number of places between "traffic originated by a Mobile Subscriber" and "traffic received by a Mobile Subscriber." See id., p. 26.

This, plaintiff contends, directly contradicts Brunelle's assertion that the phrase "calls originated by the subscriber" in the cellular telephone industry refers to both outgoing and incoming calls.

The tariff might have an impact upon the credibility of Brunelle's interpretation of the word "originated." It does not, however, as plaintiff requests the court to rule, estop Cellular One from proffering evidence in support of its current interpretation. The tariff cited by plaintiff was filed in 1993, more than a year before plaintiff signed her Contract with Cellular One and more than five years before Brunelle submitted his Affidavit. I am not persuaded, therefore, on the basis of the tariff, that I should exclude Brunelle's proffered testimony altogether.

The second basis for plaintiff's Motion is that plaintiff asserts that Brunelle does not have the personal knowledge required of a non-expert witness. Plaintiff asserts that Brunelle has no personal knowledge "of the drafting, negotiation or execution of the Contract terms." Docket No. 81, p. 3.

Cellular One asserts that Brunelle is an expert in the industry and is merely testifying about the usage of various terms in the cellular industry, not about the interpretation of the terms of the Contract.

I determine that Brunelle's lack of personal knowledge about the Contract itself does not preclude him from testifying

as an expert about the usage of certain terms in the cellular industry. On that basis, I deny plaintiff's Motion without prejudice to a further challenge to the use of Brunelle as a witness.

The denial of plaintiff's Motion is without prejudice because it is not clear from the record whether defendant has met its disclosure obligations under the Federal Rules of Civil Procedure with respect to Brunelle as an expert witness. See Fed.R.Civ.P. 26. My denial of plaintiff's Motion will not serve to preclude plaintiff from challenging defendant's use of Brunelle on these grounds.

IV. Defendant's Motion for Protective Order

Defendants request a protective order preventing plaintiff from deposing Brunelle until after the court has decided the Motions for Summary Judgment. Docket No. 84. Because I will decide the Motions for Summary Judgment in this Memorandum and Order, I need not reach the merits of Defendant's Motion for a Protective Order. It will be dismissed.

V. Issues Bearing on the Motions for Summary Judgment

A. Summary Judgment Standard

In order to be entitled to summary judgment, in circumstances like those associated with the motions now pending before the court, the movant must make a preliminary showing of the absence of any genuine dispute of material fact and that it

is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the movant satisfies this burden, then the nonmovant, must "demonstrate, through specific facts, that a trialworthy issue remains." Cadle Co. v. Hayes, 116 F.3d 957, 960 (1st Cir. 1997).

Issues of fact are in "genuine" dispute if they "may reasonably be resolved in favor of either party." Id. Facts are "material" if they possess "the capacity to sway the outcome of the litigation under the applicable law." Id. The facts in genuine dispute must be significantly probative in order for summary judgment to be denied; "conclusory allegations, improbable inferences, and unsupported speculation will not suffice." Id.

B. Liability on the Contract Language

(1) Applicable Law

The Contract expressly states, "This contract shall be construed in accordance with and governed by the laws of the Commonwealth of Massachusetts." Neither party has argued that the court should apply the law of some other jurisdiction. I will apply Massachusetts law.

(2) Contract Interpretation Principles

Under Massachusetts law, interpretation of unambiguous contracts is ordinarily the province of the court. See Rank v. International Business Machines Corp., 145 F.3d 420, 424 (1st Cir. 1998). Should the court determine the contract to be ambiguous, however, "contract meaning normally becomes a matter

for the factfinder." Id. (quoting Den Norske Bank AS v. First Nat'l Bank of Boston, 75 F.3d 49, 52 (1st Cir. 1996)).

In construing a contract, the court applies the ordinary meaning of the words. Ober v. National Casualty Co., 60 N.E.2d 90, 91 (Mass. 1945)("In the construction of contracts in writing words that are plain and free from ambiguity must be construed in their usual and ordinary sense.... The word theatre is to be construed as it is understood by ordinary man."). Where the language at issue arises out of a particular industry, however, the court need not blindly apply the meaning that a layperson, unschooled in the usage of the industry, would apply. See Berwick & Smith Co. v. Salem Press, 117 N.E.2d 825, 826-27 (Mass. 1954)(permissible for party to explain meaning of contract in terms of trade usage).

(3) Billing for Incoming Calls

(a) Introduction

Paragraph 13 of the Contract bears upon the billing method for telephone calls. In part, it declares: "Chargeable time for calls originated by a Mobile Subscriber Unit starts when the Mobile Subscriber Unit signals call initiation." (¶ 13).

Cellular One does not dispute plaintiff's assertion that it bills for incoming calls (that is, calls where someone has called plaintiff's cellular phone). Cellular One asserts, however, that it is permitted to bill for such calls for two reasons.

(b) The Brochure

Cellular One asserts that it sends the same brochure to all of its customers after they receive their phone. A copy of the brochure is attached to the Affidavit of James Beverley (Docket No. 73, Ex. B). This brochure informs the reader that "Cellular One bills in one-minute increments for both outgoing and incoming calls." Id. at p. 16. On the basis of this brochure, Cellular One asserts that it was permitted to bill for incoming calls.

It is possible that Cellular One might be entitled to judgment on the basis of the information disclosed in this brochure. I do not accept plaintiff's position that, because of the integration clause in the Contract, no other evidence may be considered to ascertain what the parties were agreeing to. The Contract, despite its integration clause, was not in fact integrated. For example, it depends for several key terms, most importantly price per minute, on the "ATGIF" billing plan, which is only referred to in the Contract. Therefore, despite the integration clause, the Contract cannot be interpreted as embodying the parties' entire agreement. The brochure has a bearing upon this case. Plaintiff, however, denies having received it (or at least does not remember having received it). Whether she in fact received it is a question of fact that this court cannot decide on a motion for summary judgment.

(c) Interpretation of the Contract

Taken in the context of ordinary land-line telephone

service, a lay person would interpret the phrase, "for calls originated by the Mobile Subscriber Unit," to mean calls in which the mobile phone owner is placing a call, not receiving a call. Plaintiff insists that the court should interpret Paragraph 13 of the Contract in the same way. See Docket No. 66, p. 8.

Cellular One asserts that the Contract, taken as a whole, should be interpreted to allow it to bill for incoming calls. First, Cellular One points to the fact that the customer is given the option, as is evidenced on the bottom of the front page of the Contract, of restricting the service so that the phone may only be used for "out-going calls." This might be interpreted to imply that the customer will be billed for incoming calls if the customer does not choose to restrict the service.

Furthermore, defendant asserts that, in the context of cellular telephone technology, the words of Paragraph 13 of the Contract have a different meaning than they would if arising out of the land-line-telephone context.

> Unlike traditional landline telephone services, in order to receive an incoming telephone call, a cellular user must press the "send" key (or its equivalent) on her mobile telephone. The act of a mobile cellular user pressing the send key to receive an incoming telephone call is known as call initiation because, given the technology, only the cellular user can "signal" the cellular tower to "initiate the phone call."

Docket No. 71, p. 9. Defendant proffers evidence to support this interpretation in the form of the Affidavit of John Brunelle

(Docket No. 74, filed March 1, 1999), who is prepared to testify about the meaning of the terms at issue as those terms are used in the cellular telephone industry.

The language of Paragraph 13 is technical, making it possible that its ordinary meaning is not applicable in this context. Smilow herself, when asked in her deposition to interpret the language of Paragraph 13, was unable to do so. See Docket No. 76, Ex. A, p. 46-47. She explained her difficulty by saying, "it's technical."

The fact that the language is technical, however, does not mean that defendant's interpretation of it must be accepted. Brunelle's affidavit states a conclusion on this dispute about usage. Based on familiarity with "the terms that describe the various functions of that network both within Cellular One particularly, and in the cellular industry generally," he gives his interpretation of various terms. Brunelle's assertions of his experience do not persuade the court that, as a matter of law, his statements about the cellular industry must be accepted. Furthermore, plaintiff has proffered evidence that indicates that Brunelle's interpretation of the word "originated" is not universal within the industry and, in fact, is not consistently applied by Cellular One. The court may ultimately have to decide this issue as a matter of contract interpretation, but on the evidence currently before the court, neither side is entitled to summary judgment.

(4) Rounding

Defendant asserts that its agreement with plaintiff permits it to round call times up to the next minute for the purposes of billing. Neither the Contract nor the other evidence proffered by Cellular One explicitly declares that Cellular One can round calls up to the next minute. Therefore, Cellular One can be permitted to do so only if a term authorizing such rounding is supplied to the parties' agreement from another source.

Ordinarily, a court will not "add a whole new provision" to a contract unless "additional terms are 'essential to a determination.'" Cofman v. Acton Corporation, 958 F.2d 494, 497 (1st Cir. 1992). In supplying a term, the court's task is to arrive at a solution

> which appears to be in accord with justice and common sense and the probable intention of the parties. [The contract] is to be interpreted as a business transaction entered into by practical men to accomplish an honest and straightforward end.

Cofman, 958 F.2d at 497 (quoting Clark v. State Street Trust Co., 169 N.E.2d 897 (Mass. 1930)).

Plaintiff asserts that no additional term is needed because the Contract itself specifies a call's end time for billing purposes. Paragraph 13 of the Contract specifies that "chargeable time" ends "when the Mobile Subscriber Unit signals call disconnect to CI's facilities and the call disconnect signal has been confirmed." Docket No. 73, Ex. A.

This language quoted by plaintiff does not, as

plaintiff asserts, answer the question of whether rounding is permitted. The fact that Cellular One bills on the basis of a unit of time, which is undisputed, necessarily implies that some form of rounding will occur. It is not reasonable to expect all of the telephone calls a customer makes to end precisely at the end of a minute, a second, or even a nanosecond. Plaintiff herself recognizes this fact, noting that it is a "rare instance ... in which a call lasts an exact number of minutes and no seconds." Docket No. 80, p. 10. Therefore, for billing purposes, calls generally must be rounded to some unit of time, either up or down. A rounding method is essential to a determination of plaintiff's claim that Cellular One is not entitled to round calls up. And yet, the Contract is silent as to the method Cellular One will apply in rounding the time of calls. Therefore, the decisionmaker (court or jury) must decide what term will be supplied and from what source.

If a court is the decisionmaker, it is faced with two issues. First, what is the appropriate unit of time to which calls should be rounded? Second, what is the appropriate method of rounding? That is, should calls always be rounded up, rounded down, or some variation or combination of both.

I determine for the following reasons that the method that Cellular One employed - rounding calls up to the nearest minute - is the result that the parties would have reached had they addressed this issue in entering their Contract.

First, the "rate plan" specified that calls would be

billed by the minute. If the parties had intended that the customer be billed for the number of seconds the phone call lasted, one would expect the billing rate to be measured by the second.

Second, the course of conduct between the parties indicates that rounding calls to a full-minute increment was permitted. The phone bills sent to plaintiff by Cellular One always billed telephone calls in units of minutes. "Because no reasonable customer could actually believe that each and every phone call [] made terminated at the end of a full minute, the customer must be aware that [the telephone company] charges in full minute increments only." Alaska v. MCI Communications Corp., 111 F.3d 909, 912 (D.C.Cir. 1997); see also, Marcus v. AT&T Corp., 938 F.Supp. 1158, 1174 (S.D.N.Y. 1996), aff'd 138 F.3d 46 (2d Cir. 1998). The fact that Smilow was reading her bills (which expressed all of her calls in units of minutes) and paying them without complaint (until the filing of this lawsuit) for a number of years is evidence that she understood her Contract with Cellular One to allow them to round calls in full-minute increments.

Finally, it would not have been reasonable to think that Cellular One was agreeing to round calls down. Common sense and experience inform us that, when we are billed by a unit of time, the time is ordinarily rounded up. Suppose a person parks her car in a parking lot with a sign that states that the parking costs $6 per half-hour. If she leaves after forty minutes, she

does not reasonably expect the parking-lot owner to round down and charge her only six dollars. Nor does she reasonably argue with the attendant that she only owes eight dollars. She pays the full twelve dollars even though her agreement with the parking lot owner does not specify that time will be rounded up. The same is true in the case at hand.

Accordingly, summary judgment is appropriate against plaintiff on the claims as they relate to Cellular One's practice of rounding calls up.

C. Defendant's Waiver Argument

Cellular One asserts that Smilow paid her bills without complaining after she learned about the billing practices in question.

In order to be entitled to summary judgment on this argument, Cellular One must prove that, as a matter of law, Smilow voluntarily waived her claim against it by paying without objection. That requires Cellular One to proffer evidence establishing beyond genuine dispute that Smilow knew she was being billed for incoming calls and understood that the Contract did not permit Cellular One to charge her for incoming calls (if, in fact, that was the case). Only then might her failure to object constitute a bar against her claims.

In fact, plaintiff received only one incoming call for 31 cents on May 25, 1996. She claims not to have noticed this charge on her bill. I cannot determine as a matter of law, given the small size and the fact that plaintiff was only billed for

one incoming call ever, that she must have noticed that she was being billed for incoming calls. Therefore, Cellular One has not established that it is entitled to judgment as a matter of law on its waiver argument.

D. Preemption

In 1993 Congress amended the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., to provide for federal regulation of commercial mobile wireless services. See Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, § 6002, 107 Stat. 312, 387-97 (1993). In order to provide uniformity and deregulation of the industry, Congress amended Section 332 to provide:

> No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. 332(c)(3).

The Communications Act imposes a duty upon telecommunications providers to charge only "just and reasonable" charges, declaring that any unjust or unreasonable charges are unlawful. 47 U.S.C. 201(b). The Communications Act provides a method of enforcing this provision under 47 U.S.C. §§ 205 and 207. Plaintiff is seeking recovery under this remedy but is also bringing a state-law contract claim.

Defendant asserts that plaintiff's state-law contract claim is, in substance, a Section 201(b) claim in that it, in

practical effect, challenges the billing practices of a cellular telephone service provider. Not every state-law claim challenging the billing practices of a telecommunications provider, however, runs into a conflict with § 201(b) that requires it to be preempted. See Marcus v. AT&T Corp., 138 F.3d 46 (2d Cir. 1997)("we cannot agree ... that every state law claim challenging a carrier's rates or billing practices necessarily arises under federal law.").

Although the Court of Appeals for the First Circuit has not addressed the issue, I expect it to establish a test for preemption in which claims are preempted only if they challenge the reasonableness or justness of a billing practice. Such a test would be consistent with the policies of the Communications Act of ensuring consistent regulation (whether by direct state regulation or through common law causes of action) without interfering with the state's authority to "regulat[e] the other terms and conditions of commercial mobile services.". 47 U.S.C. 201(b)(emphasis added).

Some of the sources that provide insight into the manifested meaning of the Communications Act and the 1993 amendment confirm that this rule of preemption is appropriate. First, the Communications Act specifies that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. From the plain meaning of this language, I conclude that the

Communications Act does not strip away all of the protections state law affords the telecommunications consumer.

The legislative history of the 1993 amendment to the Communications Act also suggests this interpretation. The legislative history declares:

> It is the intent of the committee that the states still would be able to regulate the terms and conditions of these services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters.... This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions.'

H.R.REP. No. 103-111, 103rd Congress, 1st Sess. 211, reprinted in 1993 U.S.C.A.A.N. 378, 588 (emphasis added).

In this case, plaintiff's state contract claim does not allege that the rates Cellular One charged were unreasonable or unjust. Rather, plaintiff's claim is that Cellular One agreed with the plaintiff to bill in one manner and failed to abide by that agreement. Thus, I determine that the contract claim is not preempted by the Communications Act.

ORDER

For the foregoing reasons, it is hereby ORDERED:

(1) Plaintiff's Motion for Partial Summary Judgment as to Liability on Breach of Contract Claim (Docket No. 63, filed December 9, 1998) is DENIED;

(2) Defendant's Cross Motion for Partial Summary

Judgment (Docket No. 70, filed March 1, 1999) is DENIED with respect to plaintiff's claim that defendant improperly bills for in-coming calls, and GRANTED with respect to plaintiff's claim that defendant improperly rounds telephone calls up when billing.

(3) Plaintiff's Motion to Strike Affidavit of John Brunelle and for Sanctions Against Defendant Southwestern Bell Pursuant to Rule 56(g) of the Federal Rules of Civil Procedure (Docket No. 81, filed May 28, 1999) is DENIED.

(4) Defendant's Motion for a Protective Order to Prevent the Deposition of John Brunelle (Docket No. 84, filed June 8, 1999) is DISMISSED.

(5) The next Case Management Conference in this case is scheduled for 3:30 p.m., July 21, 1999.

Robert E. Bacharach

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, on her behalf and on behalf of all others similarly situated, Plaintiff v. SOUTHWESTERN BELL MOBILE SYSTEMS, INC. d/b/a CELLULAR ONE, Defendant	CIVIL ACTION NO. 97-10307-REK

Memorandum and Order
September 30, 1999

I.

Pending before this court are the following filings:

(1) Plaintiff's Motion for Reconsideration (Docket No. 93, filed August 26, 1999), with Memorandum in Support (Docket No. 94, filed August 26, 1999);

(2) Defendant's Opposition to Plaintiff's Motion for Reconsideration (Docket No. 99, filed September 9, 1999), with Memorandum in Support (Docket No. 100, filed September 9, 1999);

(3) Defendant's Motion for Reconsideration (Docket No. 90, filed August 26, 1999), with Memorandum in Support (Docket No. 91, filed August 26, 1999);

(4) Plaintiff's Memorandum in Opposition to Defendant's Motion for Reconsideration (Docket No. 101, filed September 14, 1999).

II. Background

This class action complaint was filed against defendant, Southwestern Bell Mobile Systems, Inc. ("Cellular One"), to recover damages under 47 U.S.C. §§201, 206, 207, Massachusetts General Laws, Chapter 93A, §2(a), and the common law of contracts.

Cellular One is in the business of selling cellular services. The named plaintiff ("Smilow") entered into a contract (the "Contract") for cellular telephone services with the defendant on December 31, 1995. Paragraph 13 of the Terms and Conditions of the Contract states:

> Chargeable time for calls originated by a Mobile Subscriber Unit starts when the Mobile Subscriber Unit signals call initiation to Cl's [Cellular One's] facilities and ends when the Mobile Subscriber Unit signals call disconnect to Cl's facilities and the call disconnect signal has been confirmed. Chargeable time may include time for the cellular system to recognize that only one party has disconnected from the call, and may also include time to clear the channels in use.

Docket No. 65, Ex. 1, p.2, paragraph 13.

In the Contract, plaintiff chose a "rate plan." Docket No. 65, Ex. 1, p. 1. She chose the "ATGIF" rate plan, which specified a certain cost per minute, depending upon the time of day of the call (Docket No. 76, Ex. A, p. 79), and included 20 "free" minutes (Docket No. 75, p.2).

Plaintiff alleges that defendant overcharges for its

cellular phone service in two ways. First, she asserts that defendant, in violation of the contract between the parties, charges for incoming as well as outgoing calls to plaintiff's cellular phone. Second, she alleges that defendant, in violation of the contract between the parties, rounds up the Chargeable Time to the next whole minute.

In its Memorandum and Order of June 10, 1999, this court granted defendant's Cross Motion for Partial Summary Judgment with respect to plaintiff's claim that defendant improperly rounds telephone calls up when billing, and denied the motion with respect to plaintiff's claim that defendant improperly bills for incoming calls. Pending before this court are defendant's motion to reconsider the denial of summary judgment with respect to the incoming-call claim, and plaintiff's motion to reconsider the grant of summary judgment with respect to the rounding-up claim.

III.

Defendant argues that this court should reconsider its earlier decision denying summary judgment on two grounds. First, defendant argues that the Affidavit of James Beverley (Docket No. 73, Ex. B) provides prima facie evidence that plaintiff received the Cellular One User Guide ("the Brochure"). Defendant argues that this evidence is unrefuted, that it compels this court's

finding that plaintiff received the Brochure, and that such a finding compels this court to grant summary judgment in its favor. I rule to the contrary.

The cases defendant cites in support of its argument that "[t]he mailing, postage prepaid, of a properly addressed letter is prima facie evidence of its receipt by the addressee ...," Anderson v. Town of Billerica, 309 Mass. 516, 518 (1941), concern circumstances involving specific admissible evidence of the sending of a particular letter, from which the court has inferred receipt by the addressee. Here, defendant proffers evidence concerning its general practice of sending brochures to new customers, not specific evidence concerning the dispatch of this particular brochure. See Beverly Affidavit, ¶5. Plaintiff denies having received the Brochure. Whether she in fact received it is a question of fact that this court cannot decide on a motion for summary judgment.

Defendant also urges the court to reconsider its determination of defendant's waiver claim. Defendant points to those responses in plaintiff's deposition testimony that defendant argues manifest her knowledge that Cellular One charged for incoming telephone calls. Insofar as defendant is arguing that this knowledge alone is sufficient to prove voluntary waiver, defendant misunderstands this court's earlier memorandum and order.

> In order to be entitled to summary judgment on this argument, Cellular One must prove that, as a matter of law, Smilow voluntarily waived her claim against it by paying without objection. That requires Cellular One to proffer evidence establishing beyond genuine dispute that Smilow knew she was being billed for incoming calls and understood that the Contract did not permit Cellular One to charge her for incoming calls (if, in fact, that was the case). Only then might her failure to object constitute a bar against her claims.

Memorandum and Order of June 10, 1999, p. 14. Mere evidence that plaintiff knew (at some point) that Cellular One charged for incoming calls is not sufficient to satisfy this legal test.

Finally, defendant asks this court to decertify the class because, defendant alleges, the frequency with which plaintiff received incoming calls is substantially lower than the norm. This court certified the class for the reasons outlined in its Order Regarding Class Certification (Docket No. 61). After considering defendant's new submissions, I find no good reason to depart from that earlier order.

IV.

Plaintiff urges this court to reconsider its grant of partial summary judgment with respect to the rounding-up claim. Plaintiff argues that summary judgment was not appropriate, and that this court usurped the function of the jury by acting as a finder of fact. Plaintiff misunderstands the relationship

between the role of the judge and jury with respect to the interpretation of contracts. Here, in the absence of a provision regarding the proper unit of measurement for billing purposes, the law does not permit a jury to fill the gap by a finding of fact that on the record before the court would not be supported by admissible evidence sufficient to support a specific finding in plaintiff's favor. Plaintiff has still failed to proffer admissible evidence that would satisfy this need. In these circumstances, summary judgment for defendant on this claim is appropriate.

ORDER

For the foregoing reasons, it is ORDERED:

(1) Plaintiff's Motion for Reconsideration (Docket No. 93, filed August 26, 1999) is DENIED;

(2) Defendant's Motion for Reconsideration (Docket No. 90, filed August 26, 1999) is DENIED.

(3) The next scheduled case management conference is set for Monday, November 1, 1999 at 11 a.m.

Robert E. Keeton

United States District Judge

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED

SEP 14 1992

Clerk of Circuit Court
Third Judicial Circuit

BRADLEY S. JOINER and CATHERINE McKAY, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

AMERITECH MOBILE COMMUNICATIONS, INC., a Corporation,

Defendants.

No. 96-L-121

O R D E R

This matter is before the Court on Defendant's Motion For Dismissal and/or Summary Judgment. The Court hereby Orders:

1. The voluntary payment doctrine does not bar Plaintiffs' claims. The Illinois Supreme Court has determined that in order for the voluntary payment doctrine to apply, it must be shown that the "Plaintiff had knowledge of the facts upon which to frame a protest and also that the payment was not made under duress." Getto v. City of Chicago, 86 Ill.2d 39, 49, 426 N.E.2d 844, 849, 55 Ill. Dec. 519 (1982), cert. denied 456 U.S. 946 (1982). As recognized in cases cited by both parties in their briefs, the voluntary payment doctrine is a defense which bars a Plaintiff from recovering money paid under an unlawful claim of right to the payment. Thus, it is not necessary to consider application of the voluntary payment doctrine as a bar to the

action unless there is sufficient evidence that Defendant has committed an unlawful or deceptive act. The named Plaintiffs' contracts do not contain any language which discloses Defendant's practice of rounding-up every call to the next full minute. A review of the evidence submitted reveals that there was an inadequate disclosure of Defendant's round-up billing. Due to the inadequate disclosure of Defendant's round-up billing practice, Plaintiffs had insufficient knowledge with which to frame a protest. The named Plaintiffs' contracts contain a substantial cancellation fee which would be charged if Plaintiffs were to terminate their contracts before the end of their minimum contract terms. Although it is not necessary to reach the issue of duress, this substantial cancellation fee constitutes evidence of sufficient duress to defeat application of the voluntary payment doctrine. In light of the inadequate disclosure of Defendant's round-up billing practice and the early cancellation fee, the voluntary payment doctrine does not apply and Defendant's Motion for Summary Judgment fails as a matter of law.

2. Plaintiffs' state law claims challenging Defendant's failure to disclose its round-up billing practice are not preempted by federal law. While the plain language of Section 332(c)(3)(a) of the Federal Communications Act prohibits states from regulating the rates charged for commercial mobile service, it expressly preserves the states' authority to regulate "other terms and conditions of commercial mobile radio services." 47 U.S.C., 332(c)(3)(a). Plaintiffs' state law claims challenging

Defendant's failure to disclose its round-up billing practice are not preempted by the Federal Communications Act. See, e.g., Sanderson v. AWACS, Inc., 958 F. Supp. 947 (D.Del. 1997); Weinberg v. Sprint Corp., 165 F.R.D. 432 (D.N.J. 1996). Plaintiffs' state law claims are not preempted by federal law. Defendant's Motion to Dismiss based on federal preemption is denied.

3. Because no issues have been raised which require the Federal Communication Commission's discretion or expertise, the doctrine of primary jurisdiction does not bar Plaintiffs' action. Plaintiffs have alleged breach of contract and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, challenging Defendant's failure to disclose its round-up billing practices. Such claims are certainly within the scope of this Court's jurisdiction; and, accordingly, the doctrine of primary jurisdiction does not bar Plaintiffs' claims. Defendant's Motion to Dismiss based on the doctrine of primary jurisdiction is, therefore, denied.

4. Defendant has also moved for dismissal and/or Summary Judgment on the basis that Plaintiffs cannot establish that it made any misrepresentations, that any supposed misrepresentations are material or that any damages were proximately caused by any such alleged misrepresentations. Nowhere on Plaintiffs' contracts with the Defendant is there any indication that air time usage will be rounded up to the next full minute increment. Such information (i.e. round-up billing practices) is certainly

the type of information upon which a person would be expected to rely in making a contractual decision, and is thus material. Such a material misrepresentation certainly could have proximately caused Plaintiffs and/or members of the putative class to sustain damages. Therefore, Defendant's Motion for Dismissal and/or Summary Judgment regarding Plaintiffs' claims under the Illinois Consumer Fraud Act and parallel statutes is denied.

Clerk to send copies.

Entered: Sept. 14, 1998

RANDALL A. BONO, ASSOCIATE JUDGE

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BRADLEY S. JOINER and CATHERINE McKAY, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

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Defendants.

No. 96-L-121

ORDER

This matter is before the court on Plaintiffs' Motion for Summary Judgment on the issue of liability with respect to their breach of contract claim, Count I of Plaintiffs' Second Amended Class Action Complaint. Having reviewed the parties' Memoranda of Law and heard oral argument, the Court is nowwt prepared to rule. The contracts at issue here are for air usage time on cellular telephones. The Court has certified a class consisting of customers with contracts represented by Exhibits A and B to Plaintiffs' Summary Judgment Motion. Plaintiffs argue that Defendant breached both types of contracts by rounding calls up to the next whole minute increment for billing purposes without adequately disclosing this billing practice in the contracts. The Court agrees.

The type of contract represented by Exhibit A contains no disclosure at all of Defendant's intent to use round-up billing.

The type of contract represented by Exhibit B states on the front page: "All usage charges will be computed based on actual usage." This language appears in a column entitled "Monthly Bill Compenents." The Court concludes that a sentence referring to round-up billing on the back page of such contracts is insufficient to create an issue of material fact as to whether the parties agreed to round-up billing.

These are clearly adhesion contracts, with standardized terms offered on a take-it-or-leave-it basis; Defendant seems to concede as much. The Illinois Supreme Court has explained that a "contractual clause that is part of a 'boilerplate' agreement [in an adhesion contract] . . . has its significance greatly reduced because of the inequality in the parties' bargaining power." *Williams v. State Scholarship Com'n.*, 139 Ill.2d24, 563 N.E.2d 465, 150 Ill.Dec. 578, 600 (1990).

Under the circumstances presented by the present case, the round-up disclosure on the back of Exhibit B-type contracts has no significance whatsoever. That disclosure flatly contradicts the guarantee of "actual usage" billing on the contracts' front page. It would be procedurally unconscionable to allow the drafter of an adhesion contract to make an unqualified guarantee on the contract's first page, only to negate that guarantee in a single sentence buried in boilerplate language on the back side of the contracts. See *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill.App.3d 980, 408 N.E.2d 403, 410, 42 Ill.Dec. 25, 32 (1st Dist. 1980) (explaining that contracts may be unenforceable when "some impropriety during the process of

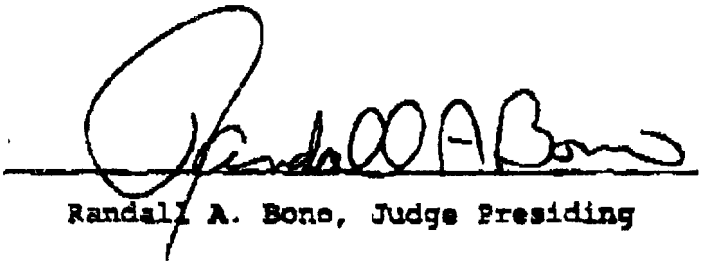
forming the contract depriv(es) a party of a meaning choice"). Plaintiffs correctly note that Defendant's round-up billing could at least theoretically result in customers being charged an hour and a half of usage time for only 90 seconds' worth of calls. At least in the absence of an explicit, uncontradicted contractual provision to the contrary, it would be unconscionable to permit the drafter of an adhesion contract to charge for substantial amounts of service which the drafter does not provide.

The Court finds that the contracts represented by Exhibits A and B to Plaintiffs' Motion for Summary Judgment unambiguously entitle Defendant to bill only for air time which customers actually use. There is accordingly no need for the Court to consider extrinsic evidence concerning the parties' intent or to apply rules of contract construction. *In re: Marriage of Belk*, 239 Ill.App.3d 805, 605 N.E.2d 86, 88 178 Ill.Dec. 647,649 (2nd Dist., 1992) ("[A] court will not resort to rules of construction when the language of a contract is clear and its meaning unambiguous."); *Asher v. Farb Systems, Inc.*, 256 Ill.App.3d 792, 630 N.E.2d 443, 445, 196 Ill.Dec. 508, 510 (1st Dist. 1993) ("When it finds a contract to be unambiguous, a trial court may look only to the language of the contract to determine the meaning of its provisions.")

Having concluded that the language of the contracts at issue here does not allow Defendant to engage in round-up billing, the Court holds that no issue of material fact exists as to whether Defendant breached its contracts by doing just that. Plaintiffs' Motion for Summary Judgment on the issue of liability in Count I

of their Second Amended Class Action Complaint is therefore GRANTED.

IT IS SO ORDERED.



Randall A. Bone, Judge Presiding

Dated this 11th day of May, 1999.